No. SC87748

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

ROBERT W. DAVIS,

Appellant.

Appeal to the Missouri Supreme Court
From the Circuit Court of St. Charles County, Missouri
Eleventh Judicial Circuit
The Honorable Lucy D. Rauch, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
lisa.kennedy@ago.mo.gov
Attorneys for Respondent

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JURISDICTIONAL STATEMENT

This appeal is from convictions for first degree robbery, §569.020,[1] first degree burglary, §569.160, resisting arrest, §575.150, seven counts of felonious restraint, §565.120, and eight counts of armed criminal action, §571.015, obtained in the Circuit Court for St. Charles County, the Honorable Lucy Rauch presiding. Judge Rauch sentenced appellant as a persistent offender to consecutive terms of life imprisonment for the robbery and burglary counts, seven years for resisting arrest, fifteen years for each count of felonious restraint, and fifty years for each count of armed criminal action. On June 6, 2006, the Missouri Court of Appeals, Eastern District, issued its opinion stating that it would reverse the judgment and remand for a new trial, but because of the general interest and importance of the issue regarding the effect of the failure to swear the jury in a criminal case, and for the purpose of reexamining existing law, transferred the case to the Missouri Supreme Court pursuant to Rule 83.02.

[1]All statutory citations are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Appellant, Robert Davis, was charged by amended information in the Circuit Court of St. Charles County with first degree robbery, §569.020, first degree burglary, §569.160, resisting arrest, §575.150, seven counts of felonious restraint, §565.120, and eight counts of armed criminal action, §571.015 (L.F. 72-82). Appellant was charged as a persistent offender (L.F. 79). Appellant's jury trial began on March 7, 2005, before the Honorable Lucy Rauch (L.F. 13).

Appellant disputes the sufficiency of the evidence. Viewed in the light most favorable to the verdicts, the following evidence was adduced at trial: On January 3, 2004, at approximately 8:20 p.m., forty minutes before closing time, IGA co-owner Brian Moore went into the back room of the store to check on things when a large white man wearing a dark ski mask and holding a gun stepped out in front of him and pointed the gun at him (Tr. 337, 342-343, 379, 397, 404, 420, 464, 479, 483). The gun was a black handgun with a long barrel, a 44 magnum (Tr. 343, 392, 404-405, 462, 470, 483-484). The man said, "All we want is the money. No one is going to get hurt. We're going back up to the safe" (Tr. 344). When Brian turned around, the man poked the gun in the back of Brian's neck; at that time Brian saw that there was a second man in the back office (Tr. 344). The first man told the second man, who was also white and wearing a dark ski mask, that he could come out now (Tr. 344, 397, 404, 420, 464, 479). The second man had a shorter-barreled black handgun (Tr. 344, 393, 406, 462-463, 470, 482).

The first man was bigger, both in height and weight, than the second man (Tr. 343-344, 395-396, 404, 419-420, 461-462, 472, 479). Both men were heavy set; the first man appeared to be 250 pounds and a little over six feet tall, while the second man appeared to be 5'7" to 5'9" and relatively large for his height, between 170 and 230 pounds (Tr. 343-344, 461-462, 479, 488-489). The men were wearing dark colored gloves and clothing (Tr. 400, 423, 464, 483-484). The shorter man was wearing worn-looking black military boots, a Marlboro jean jacket, and a pair of light grayish-blue sweat pants (Tr. 406-407, 480-481).

Brian Moore's sixteen-year old son, Sean, who was working that night, came through the back door and Brian told him that they were going to do what the men said (Tr. 345, 389-390). They all walked toward the front of the store (Tr. 345, 391). Customer Kenneth Condor was at the store buying soda that night, and when the robbers saw him, they escorted him to the front of the store (Tr. 345, 391-392, 403-404, 406). Another customer, Terry Pointer, had just paid for his groceries when the robbers got to the front of the store and told him to stop and sit down (Tr. 461).

Brian showed the men that there was no money in the safe, which was at the front of the store (Tr. 345-346). Brian told them that the money was in the front office (Tr. 346). The first robber went to the front office with Brian, and Brian emptied the money from the cash drawers into a heavy duty black plastic bag that the robbers brought with them (Tr. 346, 348, 366-367, 394). While Brian was in the front office, Sean sat between the first and second registers (Tr. 393-394). Two other employees, Rachel Wilman and Renee Hudson, were also sitting by the registers (Tr. 420, 471). The second robber made Renee take the

cash drawer out of the second register (Tr. 471). Sean, Rachel, and Renee heard the second man call the first man, "Paul," but then correct himself and repeat the name, "Ed" several times (Tr. 395, 420, 471-472). Another employee, James Vails, was near the third register (Tr. 479). James heard the second robber repeatedly say "okay, okay, okay" (Tr. 497). His repeated utterance of the phrase was possibly a nervous habit because he was not responding to a question (Tr. 497-498).

Some of the store's cash was kept in bundles and some was loose (Tr. 346). There were also some rolls of coins in white wrappers with orange print (Tr. 347). The store would put $20 bills into four bundles of five hundred dollars each with each bundle having a rubber band around it (Tr. 363). The $10 bills were put into two bundles of $500 each, the $5 dollar bills were put into two bundles of $250 each, and the $1 bills were put into five bundles of $20 each (Tr. 363). The bundles of each denomination of bills were then held together with a larger rubber band (Tr. 363). The robbers took about $4,400 (Tr. 365).

After the men got the money, they took Brian, the four employees working at the time, and two customers, into the meat cooler in the back room (Tr. 348-349, 395, 407, 421, 464, 473, 484-485, 487). They said no one was going to get hurt (Tr. 349). The temperature of the 10' by 15' meat cooler was kept in the low thirties (Tr. 342). There were front and back freezer-type doors to the meat cooler (Tr. 341-342, 356). The gunmen shut the front door to the cooler and told them to stay there (Tr. 349). One of the employees knew that they could get out of the meat cooler (Tr. 473). The robbers did not mention a specific amount of time to stay in the cooler, so Brian waited for two or three minutes, which he thought was

enough time for the men to leave, and went out and checked the store (Tr. 349). The men had left, and Brian called 911 (Tr. 349). When he checked the back office, Brian also found that the videotape from the store's surveillance system was missing and that a phone cord had been cut (Tr. 367-368, 618).

On January 4, the day after the IGA robbery, St. Peters detective Michael Helm was off duty when he saw a white Chevrolet full-size pickup pull in front of his house (Tr. 508). The driver had black hair and a mustache, and the passenger was a "heavier-set" man with a big mustache and a long bushy beard (Tr. 509). Detective Helm had been given information in the "few weeks" leading up to that day to be on the lookout for a man matching the passenger's description (Tr. 514).

Detective Helm called the St. Peters police department and had them run the license plate on the truck (Tr. 514). He learned that the license plates had been reported stolen (Tr. 514). Because Helm lived in O'Fallon, he then called the O'Fallon police and reported the information (Tr. 514-515). As Helm was waiting for the police to arrive, the passenger got back into the truck and the men drove away, so Helm got into his car and followed them in order to update their location for the O'Fallon police (Tr. 515). The police soon arrived, and Helm returned home (Tr. 515).

Officer Steve Schneider was one of the O'Fallon police officers who was dispatched to find the truck Helm had reported (Tr. 517). As Officer Schneider was driving to the area, a pickup truck matching the description he was given pulled right in front of him (Tr. 518). After verifying that the license plates on the truck had been reported stolen, Officer

Schneider activated the lights on his marked police car, and stopped the truck in the parking lot of a daycare (Tr. 518-519). Because he stopped the truck for having stolen plates, Schneider got out of his car, drew his gun, and stayed behind the door to his patrol car (Tr. 521). He ordered the driver of the truck to throw his keys out of his open window (Tr. 521-522). Instead, the driver briefly looked over his right shoulder, and then drove off through the parking lot, jumped a curb, drove through a grassy area, and then went north on Bryan Road (Tr. 522). The driver was appellant and the passenger was Paul Bainter (Tr. 530-531, 556). Officer Schneider would have arrested appellant and Paul Bainter for possessing stolen license plates had the two men not fled (Tr. 535).

Officer Schneider got back into his car, activated his lights and sirens, and began to follow the pickup truck north on Bryan Road (Tr. 525). The truck came to the I-70 interchange, crossed over the highway, and then turned the wrong way, heading east down the off-ramp for westbound traffic on I-70 (Tr. 525). Schneider made a u-turn, crossed back over I-70, and went east on I-70 (Tr. 528). Schneider was able to keep the truck in sight for about a quarter of a mile, until a hill and traffic blocked his view (Tr. 528). There was other traffic on westbound I-70 and Schneider saw that one car had to swerve toward the concrete median to avoid the pickup that was driving the wrong way down I-70 (Tr. 526).

Schneider saw the white pickup truck in the grassy median north of the interstate (Tr. 528). He got off at the next exit and drove to where the truck had been abandoned (Tr. 528). Other officers responded to the scene (Tr. 529, 537). One of those officers was Chad Gerler, who drove westbound on I-70 to try and find the truck and to slow traffic down (Tr. 537).

He spotted the truck and saw appellant and Paul Bainter run from the truck and climb over a fence, heading north (Tr. 538). Officer Gerler stopped his car and chased the men on foot, telling them that they were under arrest (Tr. 538). He saw that Bainter was carrying a camouflage bag in his hand, and appellant was carrying a red bag (Tr. 541). Gerler continued to give loud verbal commands to the men to stop running because they were under arrest; it was apparent that the men knew they were being chased because Bainter kept looking back at Gerler (Tr. 542).

Officer Gerler lost sight of appellant, but was able to catch up to Bainter in the yard of a private residence at 750 Danny Lane (Tr. 542, 550). When Gerler attempted to tackle Bainter, he did not fall to the ground because he was so large, but the contents of the bag he was carrying did fall onto the ground (Tr. 542-543). Gerler then struck Bainter in the thigh with his baton in an attempt to get him to the ground (Tr. 543). This did not work, and Bainter attempted to grab a hold of the baton (Tr. 543). Finally, Gerler pointed his gun at Bainter until another officer reached them (Tr. 543-544). When another officer arrived, Bainter was finally subdued and handcuffed (Tr. 544).

Gerler found the camouflage fanny pack that Bainter had been carrying lying open on the ground (Tr. 545, 889, 895). There were live rounds of 44 and 22 caliber ammunition and five rolls of quarters in the fanny pack and nylon gloves, a empty black holster, and an empty Winchester box that had contained 44 caliber Magnum rounds on the ground near the fanny pack (Tr. 545, 547-548, 550-552, 889, 892-893, 896-899, 904-906). Four of the five rolls of quarters were wrapped in white paper with orange writing on it, and the other roll was

wrapped in brown paper (Tr. 898-900). An address book with Bainter's name on it and appellant's address in it was also in the pack (Tr. 903-904). A piece of paper in the fanny pack had handwritten directions that said "to Highway 270, North on 70, go north, and Missouri Bottom Road" (Tr. 903). Officers thought this might relate to the investigation of the robbery of the McDonald's Bar that was located in the area of Missouri Bottom Road and Villa Donna in Hazelwood (Tr. 903, 1012). Gerler found a loaded 44 caliber revolver underneath some bushes in the area where he had struggled with Bainter (Exhibit 1) (Tr. 545, 548, 550-551, 889, 892-893).

Bainter was taken to a hospital to be treated for injuries he received in the course of being arrested (Tr. 604). At the hospital, O'Fallon police officer Michael Magrew seized Bainter's clothing and other possessions, including a green and black flannel jacket, a pair of shorts, a pair of sweat pants, a shirt, a pair of tennis shoes that had been spray painted black, and a maroon ski mask that was in a pocket of the jacket (Tr. 605, 607, 964-966). Officer Magrew found a roll of cash in the pocket of Bainter's shorts, a large amount of cash that had been folded in half in the pocket of the sweat pants, and small amounts of cash in various other pockets (Tr. 607-608). The money included five rubber-banded stacks of $1 bills, twenty bills in each stack; three $100 bills; eight $50 bills; forty-eight $20 bills; five $10 bills; a $5 bill, and three loose $1 bills (Tr. 971-979). One of the $20 bills had staple-like holes in it (Tr. 977-978).

Appellant was caught with the assistance of a passing motorist, Michael Greene, who lived in the neighborhood where appellant and Bainter fled (Tr. 561-562). Michael saw

Bainter and appellant, who was carrying a red bag, running from the white truck (Tr. 562-563). When he noticed that a police officer was chasing the two men, he decided to attempt to slow appellant down (Tr. 564). When appellant passed in front of his car, Greene got out of his car and ran after him (Tr. 565). Appellant approached a fence, threw the red bag over the fence, and started to climb over it (Tr. 565). Greene told appellant not to move, wrestled him to the ground, and held him in an arm lock until the police arrived (Tr. 565-566). The police arrived shortly thereafter and took appellant into custody (Tr. 567, 576, 603-604).

Officers found the red bag that appellant had thrown over the fence (Tr. 577). The bag was a Marlboro brand bag (Tr. 907). The red bag contained clothing, loose change, a red bandana with 120 quarters and 50 dimes tied into it, two rolls of quarters, a roll of nickels, a roll of pennies, two black nylon drawstring bags (Exhibit 13), a green ski mask, and a large bundle of dollar bills secured with rubber bands (Tr. 580, 593, 595, 907-908, 912-914, 917). One drawstring bag contained a $5 and $10 bill (Tr. 909). The money from the red bag included thirty-one $20 bills, forty-five $10 bills, thirteen $5 bills, and sixteen stacks of $1 bills, twenty bills in each stack (Tr. 919-921).

Police seized several items from appellant when he was brought to the O'Fallon Police Department, including a pair of black military-style boots (Exhibit 48) and black nylon-type gloves that were similar to the ones seized from the residence on Danny Lane where Bainter was apprehended (Tr. 930-931). The police also searched the white pickup after having it towed to the police station (Tr. 930, 934). Inside the truck, officers found a denim Marlboro jacket (Exhibit 22), two Wal-Mart bags, and a Famous Barr bag (Tr. 936). In a pocket of the

Marlboro jacket was a brown paper bag containing a stack of money and an envelope addressed to appellant (Tr. 937-938). The bag contained two $50 bills, thirty-two $20 bills, forty-four $10 bills, and two groups of $5 bills, one had two bills and the other had twenty-eight (Tr. 942-944). Three of the $10 bills and one of the $5 bills had staple-like holes on them (Tr. 943-944). There were also four stacks of twenty $1 bills each (Tr. 945).

In one of the Wal-Mart bags was a pair of light blue sweat pants (Exhibit 36) and a navy blue ski mask, from which a cutting was made for DNA testing (Tr. 821-823, 843, 949). The DNA in the mask was consistent with that of appellant, with a frequency of 1 in 148.9 quadrillion in the Caucasian population (Tr. 841-847). The other Wal-Mart bag contained two white socks, one of which contained a loaded .22 caliber revolver (Exhibit 3) (Tr. 951-952). There were some loose coins in the other sock (Tr. 952).

The Famous Barr bag contained clothing, a green ski mask, and tennis shoes that had been spray painted black (Tr. 956, 959). One of the items of clothing was a XXXL black t-shirt with red trim (Tr. 958). There was a can of black spray paint in the truck (Tr. 957). The truck also contained four rolls of quarters, three wrapped in white paper with orange writing and one wrapped in brown paper (Tr. 960-961, 963).

The total amount of currency seized in the case was approximately $4500 (Tr. 985). Officers also seized a camouflage shirt in the case (Tr. 1008-1009).[2]

[2]The record does not reflect where this shirt was found.

People present during the IGA robbery had the opportunity to view several of the items seized from appellant and Paul Bainter, and make the following comparisons:

- The gun the larger robber used was similar to State's Exhibit 1, the .44 caliber gun found in the bushes of the residence at 750 Danny Lane where Bainter was apprehended (Tr. 343, 392, 405, 462, 484, 545, 548, 550-551, 889, 892-893).
- The gun the smaller robber used was similar to State's Exhibit 3, the .22 caliber gun found inside a sock inside a Wal-Mart bag in the white pickup truck in which appellant and Bainter fled from the police (Tr. 344-345, 393, 406, 463-464, 482-483, 951-952).
- The black bag the robbers used to hold the money from IGA was similar to State's Exhibit 13, the black nylon bag found in the red Marlboro duffel bag appellant threw over a residential fence just before he was apprehended (Tr. 394, 577, 580, 907-908, 912).
- The black military boots the smaller robber wore were similar to State's Exhibit 48, the boots seized from appellant at the O'Fallon jail (Tr. 407, 482, 930-931).
- The Marlboro jean jacket worn by the smaller robber was similar to State's Exhibit 22, the jacket found in the white pickup truck in which appellant and Bainter fled from the police (Tr. 480-481, 936).
- The sweat pants worn by the smaller robber were similar to State's Exhibit 36, the sweat pants found in one of the Wal-Mart bags in the white pickup truck in which appellant and Bainter fled from the police (Tr. 481, 949).

On January 27, 2004, appellant appeared in court (Tr. 429).[3] Rachel Wilman and James Vails who were working at IGA on the night of the robbery were also present in the courtroom (Tr. 429-430, 499-500). After seeing appellant look at her in the courtroom, Rachel made the following statement to the police regarding appellant:

> He glanced at us when we were in the Court . . . That's when I really knew it was him because I saw his eyes. The night of the robbery he kept looking at Renee, which [sic] was sitting next to me, so I was able to recognize his eyes and part of his face.

(Tr. 429-430, 436). When she said that she "really knew it was him," Rachel meant that she knew that appellant was "the one that was controlling us, the smaller one, when the robbery happened" (Tr. 437). While in the courtroom, James Vails recognized appellant's voice as being that of the second robber (Tr. 500). Appellant had the same nervous habit of repeating, "okay, okay, okay" as the second robber did (Tr. 500).

The officers who caught appellant and Bainter called the St. Charles County Sheriff's Department (Tr. 594, 616, 619). The sheriff's department took over the crime scene (Tr. 619). It was "very obvious" to Sergeant Craig Ostermeyer that the evidence seized from appellant and Bainter was connected to the IGA robbery (Tr. 619). Sergeant Ostermeyer also spoke with police officers from Hazelwood because a robbery that the Hazelwood police department was investigating shared a lot of similarities with the IGA robbery (Tr. 618, 620).

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[3]The record does not indicate why appellant was in court that day.

At trial, the State was allowed to present evidence regarding that similar robbery, which occurred about five miles from the IGA, at the McDonald's Bar in Hazelwood on December 30, 2003 (Tr. 645-647).[4] After the robbery at the McDonald's Bar, the police checked other businesses in the area for surveillance videos that might give them leads as to the robbers' identities (Tr. 648). A tape from a Citgo gas station about a quarter mile from the bar led to the identification of appellant and Bainter by a Citgo clerk, as having been in that gas station approximately four hours before the bar robbery (Tr. 648-649, 651, 724-727, 746-747). Bainter, as depicted on the videotape, was wearing a pair of faded camouflage pants, a dark sweat shirt, a dark colored stocking cap, and dark colored gloves (Tr. 651, 654). The clerk, Samantha Dussold, spoke with Bainter when he came in the store and remembered that he had a slight southern accent (Tr. 726). The videotape showed that appellant was wearing a pair of dark pants and a white hooded coat (Tr. 651, 654). The clerk then picked their photos from lineups prepared after the IGA robbery, when the police decided there were similarities between the two robberies (Tr. 618-620, 655, 667-668, 672-673, 722-723).

Ms. Barry, the bartender at McDonald's Bar on the night of the robbery, was also shown the surveillance tape from Citgo and the still photographs made from it (Tr. 652-653). She believed that there were two men in the video that were similar in size and shape as the

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[4]The evidence adduced at trial regarding the McDonald's Bar robbery will be presented in more detail in Point I. Appellant and Bainter were not being tried for any conduct related to the McDonald's Bar robbery in this case.

two robbers (Tr. 773-775). Also, Ms. Barry believed that the two men in the video wore similar dark clothing to the robbers; the man that looked similar to the first robber was wearing a hat that was the same color as the first robber's ski mask and a jacket that would not close all the way (Tr. 773-775). When she was shown State's Exhibits 53B and 53C, still photos of the two men from the video who she thought looked similar to the robbers, Ms. Barry identified appellant, as the smaller robber, whom she knew because he came into the bar (Tr. 775-777).[5] Ms. Barry identified the man in State's Exhibit 53D as the bigger robber (Tr. 774-775). Appellant lived a few streets behind the bar (Tr. 777).

Appellant did not present any evidence at trial (Tr. 1034). Bainter, appellant's co-defendant, called Jennifer Rico, the health services coordinator for the St. Charles County Department of Corrections, to testify that he weighed 300 pounds on January 4, 2004, eight days after his arrest (Tr. 1035).

At the close of the evidence and arguments by counsel, the jury found appellant guilty of first degree robbery, first degree burglary, resisting arrest, seven counts of felonious restraint, and eight counts of armed criminal action (L.F. 151-157; Tr. 1191-1194). On May 13, 2005, Judge Rauch sentenced appellant as a persistent offender to consecutive terms of imprisonment for life for the robbery and burglary counts, seven years for resisting arrest,

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[5]Samantha Dussold, the clerk at Citgo, also identified the man in Exhibits 53B and 53C as appellant, the smaller man, and the man in Exhibit 53D as the bigger man (whom she later identified in a lineup as Bainter) (Tr. 618-620, 655, 667-668, 672-673, 721-723, 726).

fifteen years for each count of felonious restraint, and fifty years for each count of armed criminal action (L.F. 151-157; Sent. Tr. 26-27).

ARGUMENT

I.

The trial court did not plainly err in entering sentence and judgment against appellant although the jury had not been sworn because appellant waived the error by not raising an objection until after the jury had returned its verdict and had been discharged. Nor has appellant shown how he was prejudiced by this error in that he has not shown how the absence of the oath meant that he was unfairly tried when the venire panel was sworn, the jury was given numerous instructions to ensure the fairness and integrity of the jury's deliberations, and the jury is presumed to follow the court's instructions.

On appeal, appellant alleges that because the jury was not sworn after it was empaneled, he was denied his constitutional right to trial by jury, and the jury's verdict was void (App. Br. 24).

A. Relevant Facts

The case was tried to a jury from March 7, 2005 to March 14, 2005 (Tr. 2-10). The jury returned a guilty verdict on all counts on March 14, 2005, which the trial court received without objection (Tr. 1191-1194). The jury was polled after announcing its verdicts and all jurors indicated it was their verdict (Tr. 1194-1196). The jury was discharged without objection (Tr. 1202-1203).

At some point following trial, for reasons the record does not reflect, the court reviewed the trial record and had the court reporter review her notes, and determined that the

jury had not been sworn, though the venire panel had been sworn at the beginning of voir dire (L.F. 186). The court notified counsel, who included the issue in the motion for new trial (L.F. 160-162, 186). There was a hearing on the motion for new trial on April 22, 2005; however, there is not a record of the hearing (L.F. 12).

On April 26, 2005, the court issued an order denying appellant's motion for new trial (L.F. 186). The order addressed the court's apparent failure to swear the jury after it was empaneled:

> With respect to the Court's apparent failure to administer the usual oath to the jury after empaneling the jury, despite announcing its intention to do so on the record, as brought to the attention of counsel after the Court reviewed the Court's trial notes and the court reporter reviewed her official notes, the Court finds that the members of the jury were sworn as members of the venire panel and questioned under oath as to their ability to follow the instructions of the Court and their qualifications to serve as jurors in the above styled cause, they were found qualified as jurors in this case, were empaneled and instructed by the Court without objection; were polled as to their verdicts and adopted their verdicts; the verdicts were accepted and ordered filed and the jury discharged, all without objection. The Court therefore finds that the jury was sworn and any irregularity in the oath has been waived by defendants for failure to timely make an objection; that no other grounds to grant a mistrial per 547.020

> RSMO nor to enter a judgment of acquittal have been raised by either defendant.

(L.F. 186). Then on May 13, 2005, the trial judge sentenced appellant as a persistent offender to consecutive terms of imprisonment for life for the robbery and burglary counts, seven years for resisting arrest, fifteen years for each count of felonious restraint, and fifty years for each count of armed criminal action (L.F. 187-193; Sent. Tr. 26-27). On appeal, appellant alleges that because the jury was not sworn after it was empaneled, he was denied his constitutional right to trial by jury, and the jury's verdict was void (App. Br. 24).

In reviewing appellant's claim, the Missouri Court of Appeals, Eastern District, concluded:

> We are bound by the decisions of the Supreme Court of Missouri. *State v. Randolph*, 123 S.W. 60, 61 (Mo. App. 1909). Because the record proper does not affirmatively show that the jury was sworn to try this case during the progress of trial and before they had begun to deliberate upon their verdict, the trial court plainly erred. Accordingly, Defendant's point three on appeal is granted. Generally, we would be compelled to reverse the judgment of conviction and remand the case for a new trial. However, because of the general interest and importance of the issue involved in this case and for the purpose of reexamining existing law, we transfer this case to the Missouri Supreme Court pursuant to Missouri Rule of Civil Procedure 83.02.

State v. Davis, No. 86313, *slip op.* at 7 (Mo. App. E.D. June 6, 2006).

B. Analysis

Respondent recognizes that a jury is to be impaneled and sworn before the trial proceeds. §546.070. Also, Missouri Supreme Court Rule 27.02(d) states that the order of trial in a felony case requires that "[a] qualified jury shall be selected as provided by law and shall be sworn well and truly to try the case." The *Bench Book for Missouri Trial Judges* provides the language of the oath used in Missouri to swear a selected jury:

> Members of the jury, please rise and raise your right hand to be sworn. You and each of you do solemnly swear that you will well and truly try the issues in this case, in which the State of Missouri is plaintiff and _____ is defendant, and a true verdict render according to the law and the evidence so help you God. Be seated please.

Bench Book, Vol. V, Ch. 3, Section 3.9(5) (1998).

The precedent that the Eastern District found to be controlling was several cases from early Missouri jurisprudence: *State v. Mitchell,* 97 S.W. 561 (1906), *State v. McKinney*, 120 S.W. 608 (Mo. 1909); *State v. Delaney*, 157 S.W. 305, 306 (Mo. 1913); *State v. Berry*, 195 S.W. 998 (1917), and *State v. Frazier*, 98 S.W.2d 707 (1936). *Mitchell* held that a verdict by an unsworn jury was a nullity. *Mitchell*, 97 S.W. at 562. The Court reached that result based on the formalistic view that because Missouri law (§546.070 and Rule 27.02) required a jury to be impaneled and sworn, then until a jury *was* sworn, it was not "lawfully constituted" and could not render a legal verdict. *Mitchell*, 97 S.W. at 562. Similarly, the Court in *Berry*, *Delaney*, and *McKinney* reversed the judgment and remanded the case

because the record did not show that the jury was sworn, citing to *Mitchell*. *Berry*, 195 S.W. 998 (1917); *Delaney*, 157 S.W. at 306; *McKinney*, 120 S.W. 608.

State v. Frazier is the most recent case dealing with this issue. *Frazier*, 98 S.W.2d 707 (1936). *Frazier*, however, did not involve a situation where the jury was never sworn, but instead involved the untimely administration of an oath to the jury, after five witnesses had already testified. *Frazier*, 98 S.W.2d at 715. The defendant did not object to the oath even though it was not administered at the "threshold of the trial." *Id*. The court recognized the holding in *Mitchell*, but stated that "a party may waive irregularities in the swearing of the jury, where there has been substantial compliance with the statute." *Id*. The *Frazier* court went on to affirm the defendant's sentence, holding that if a jury is sworn before they begin to deliberate, the error is not fatal, and if the defendant fails to object, as was the situation in that case, the error is waived altogether. *Id*. at 716. Strictly speaking, the court in *Frazier* moved away from *Mitchell's* formalistic approach because according to *Mitchell's* logic, it would not have mattered that the *Frazier* jury was sworn before they deliberated because there still was not a jury – because the panel had not been sworn – to hear and evaluate the testimony of five witnesses during Frazier's trial.

In this case, the members of the empaneled jury did not raise their right hands and swear or affirm to "well and truly try the case" prior to deliberations. Respondent asserts that the failure to administer the formal oath by itself should not serve as a ground for overturning an otherwise lawful verdict where a defendant does not raise an objection until after the verdict has been returned. Respondent also asserts that the record reflects that the twelve

people selected to hear appellant's case did well and truly try the case, even though the formal oath was not administered.

Such a holding would not be without precedent. Authorities from other jurisdictions have addressed this issue. Some courts have "squarely rejected the proposition that a criminal verdict by an unsworn jury is a nullity, concluding instead that a complete failure to swear the jury is akin to other objections to the jury's competency or the impartiality of its deliberations, and likewise must be raised timely and must be prejudicial." *State v. Vogh*, 41 P.3d 421, 426 (Or. App. 2002). *See also Sides v. State*, 693 N.E.2d 1310, 1312 (Ind. 1998), and *State v. Arellano*, 125 N.M. 709, 712, 965 P.2d 293 (1998).

In *Vogh*, the Oregon Court of Appeals addressed a claim of whether the complete failure to swear a jury deprived a defendant of the right to a trial by jury and whether a verdict by an unsworn jury is a nullity and therefore void. *Vogh*, 41 P.3d at 423. The court noted that no Oregon case was directly on point. *Id*. at 425. Admittedly, the court in *Vogh* noted that its review of case law from other jurisdictions showed that authority was divided and that no particular consensus existed. *Id*. However, the court found that many of the cases that held that a verdict by an unsworn jury is a nullity were dated and reached that result "based on the formalistic view that, until sworn, the jury is not 'lawfully constituted'

and cannot render a legal verdict." *Id.*[6] The court cited Missouri's *State v. Mitchell* as an example of such a case. *Id.*

Ultimately, the *Vogh* court held that the defendant's claim should be held to the same standard that Oregon courts apply to other "fair trial" objections, and so in the absence of a timely objection, "the failure to administer an oath to the jury, without any other showing of juror misconduct or prejudice, will not serve as a ground for overturning an otherwise lawful verdict." *Vogh*, 41 P.3d at 429. In reaching its decision to follow a more functional approach, the *Vogh* court found that the "absence of the oath does not mean – at least not in any necessary way – that the defendant was unfairly tried" and explained the other safeguards in place to ensure a fair trial:

> The oath does not stand alone as the sole procedure that guarantees that the jury will try the case based on the admissible evidence and the applicable law. To the contrary, numerous additional mechanisms serve the same

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[6]Not all cases based on the formalistic view of the jury are dated. In its opinion in the case of appellant's co-defendant, Paul Bainter, the Missouri Court of Appeals cited to *Keller v. State*, 583 S.E.2d 591, 593 (2003)(finding that a defendant may not waive the trial court's complete failure to administer an oath to the jury), and *State v. Godfrey*, 666 P.2d 1080, 1082 (1983)(in dicta stating that if oath had not been given at all, instead of five minutes after the jury began deliberations, the court would have reversed even absent any showing of actual prejudice).

> purpose, including but not limited to *voir dire*, peremptory juror challenges, precautionary instructions channeling the jury's deliberations, the vigilance of an unbiased trial judge, and representation by competent counsel.

Id. at 428.

In *State v. Sides*, the Indiana Supreme Court held that any error in failing to swear the jury at all was waived by the defendant's failure to make a timely objection. *Sides*, 693 N.E.2d 1310, 1312 (Ind. 1998).

In *State v. Arellano*, the defense counsel admitted that he was aware that the jury had not been sworn and that as a tactical move he deliberately did not call this to the trial court's attention until after the jury returned its verdict and was finally discharged. *Arellano*, 965 P.2d at 294. The trial court recalled the jurors after they had returned their verdict and had been discharged, administered the oath, and asked if the jurors had followed the oath during trial and deliberations in rendering its verdict. *Id*. The court noted that the purpose of administering the oath to jurors is to "ensure that the jurors conduct themselves at all times as befits one holding such an important position." *Id*. at 295. The court found that although the jury was not administered the formal oath before they rendered the verdict, the jury understood the "spirit of the oath" and purpose of the jury selection process because it was emphasized in the voir dire procedures and jury instructions. *Id*. Specifically, the court referred to the voir dire questions and jury instructions that not only impressed upon the jurors the solemnity of the jury selection process and its important purpose to find impartial persons to try the case, but also made the jury understand their duty to determine facts of the

case only from the evidence presented in court, and to deliver a verdict free from prejudice. *Id*.

Admittedly, *Arrellano* differs from the present case slightly because in affirming the judgment, the court noted favorably the fact that the trial court recalled the jury *after* it had rendered a verdict and was discharged, administered the oath, and ascertained that the jurors understood the solemnity of the proceedings and had been committed to performing their duty to decide the case on the evidence and follow the law as fair and impartial jurors. *Id*. Here, the trial court did not recall the jury after it rendered its verdict in order to conduct such an examination. Nonetheless, it is telling that the *Arrellano* court thought it was more important that the jury acted in accordance with the oath in rendering their verdict than actually being sworn before deliberating.

Another difference in *Arrellano* is that the record in *Arrellano* showed that the defendant purposely did not bring the failure to swear the jury to the court's attention until after the verdict. *Id*. at 296. The court found that the actions of the defendant's counsel constituted not only a waiver of his client's right to a sworn jury, but also a poor tactical move that the court would not reward. *Id*. Finally, the court found that there was nothing in the record to show that the failure to administer the oath until after the verdict in any way prejudiced the defendant. *Id*.

In the present case, the failure to administer the formal oath by itself should not serve as a ground for overturning an otherwise lawful verdict where a defendant does not raise an objection until after the verdict has been returned. *See Vogh*, 41 P.3d at 429; *Sides*, 693

N.E.2d at 1312. In arguing to the contrary, appellant urges only that, in criminal cases, the complete failure to swear the jury implicates the defendant's constitutional right to a fair trial by an impartial jury and renders a trial fundamentally unfair so that "prejudice is presumed and need not be demonstrated" (App. Br. 28). Appellant equates this to structural error that defies analysis by harmless error standards (App. Br. 34). However, appellant cites no cases that so hold and in fact, numerous cases addressing other issues that implicate a defendant's right to a fair trial by an impartial jury – such as juror misconduct – do not treat it as structural error.

Rather, as a rule, a defendant must timely raise and preserve a claim that some aspect of the trial violated his right to a fair trial by an impartial jury. *See generally*, *State v. Merritt*, 750 S.W.2d 516, 518 (Mo. App. W.D. 1988)(a defendant who is aware of juror misconduct cannot gamble on a verdict by remaining silent and thereafter take advantage of the matter by first asserting it in a motion for a new trial); *see also State v. Vinson*, 503 S.W.2d 40, 41 (Mo. App. Springfield Dist. 1973), and *State v. Brown*, 599 S.W.2d 498, 502 (Mo. banc 1980)(appellant's knowledge of the alleged juror misconduct prior to the conclusion of trial prevented its consideration when raised for the first time in the motion for new trial). Moreover, to be entitled to relief on such a claim, the objectionable procedure must actually be prejudicial to the defendant's interests. *Vinson*, 503 S.W.2d at 42 (trial judge heard the evidence offered concerning a magazine jurors looked at during the trial and concluded no prejudice to the defendant resulted).

The same is true of related claims, such as those involving a juror's actual eligibility and qualifications to serve as a juror. A defendant must raise an objection to the juror's competency or eligibility in a timely way and cannot, instead, do so only after gambling on a favorable jury verdict. *See e.g., State v. Hamilton*, 996 S.W.2d 758, 761 (Mo. App. S.D. 1999)(Failure to object to jurors selected and affirmatively expressing satisfaction with the jury waives any claim concerning the jury or the manner of its selection, even when those claims of error are constitutionally based).

Appellant has not provided a reason why this court should treat a failure to administer the oath to the jury as more fundamental in nature – and thus, "structural" – than the jurors' actual performance of their duties in conformance with that oath, or the jurors' eligibility or competence to be jurors. In *Vogh*, the court stated that:

> In so observing we do not denigrate the significance of the jury's oath or its value in vindicating a defendant's fundamental constitutional rights to a fair trial before an impartial jury. [citation omitted] But neither do we elevate it above the other aspects of our trial procedures that serve the same ends.

Vogh, 41 P.3d at 428. *See also Sides*, 693 N.E.2d at 1312.

Second, the record of this case demonstrates that the twelve people selected to hear appellant's case did "well and truly try the case," even though the formal oath was not administered. Members of the jury *were* sworn as members of the venire panel and questioned under oath as to their ability to follow the instructions of the court and their qualifications to serve as jurors. The record reflects that after the venire panel was

empaneled, the court described the importance of *voir dire* to select a jury of qualified and impartial people (Tr. 28). The court asked the members of the venire panel to raise their right hands, and read the following oath to them: "Do each of you solemnly swear or affirm that you will give true answers to such questions as may be asked of you by court and counsel, touching on your qualifications to serve as jurors in this cause now coming for trial so help you?" (Tr. 28). The venire members responded, "I do" (Tr. 28). It should thus be presumed that the jurors did answer questions truthfully when they indicated during voir dire that they could be fair and unbiased, and could follow the instructions of the court.

There were other safeguards present in this case that ensured that appellant had a fair trial by an impartial jury. The venire panel was instructed that the charge of any offense is not evidence and creates no inference that any offense was committed, or that either defendant was guilty of an offense; that the defendants were presumed to be innocent unless and until they found them guilty; and that the State had the burden of proving beyond a reasonable doubt that either defendant was guilty (Tr. 29-30). After the jurors were empaneled, they were instructed that at the conclusion of the trial they would receive further instructions regarding the rules they had to follow in their deliberations; that jurors must follow established rules; that it was their duty to follow the law as the trial court gave it to them; that nothing the court said or did was intended to indicate the court's opinion of the facts; that it was the jury's duty to determine the facts only from the evidence and reasonable inferences; that their decision had to be based only on the evidence presented to them in the courtroom; that they had to decide the witnesses' credibility, and the weight and value of the

evidence; that questions, opening statements, and statements or arguments of the attorneys addressed to another attorney or to the court were not evidence; and that they should draw no inference from the fact an objection was made, and should disregard a question should an objection be sustained (Tr. 312-316). The jury also received the standard instructions after the evidence was concluded and before the case was submitted to them for deliberation (Tr. 1085-1138).

Clearly, the twelve people chosen after voir dire questioning by both parties to sit in judgment of appellant and his co-defendant, like the jury in *Arellano*, understood the "spirit of the oath" because it was emphasized in the voir dire procedures and jury instructions. Appellant's jury understood the solemnity of the proceedings and their duty to well and truly try the case even though they did not swear to that phrase. As the court in *Vogh* found, "[t]he oath does not stand alone as the sole procedure that guarantees that the jury will try the case based on the admissible evidence and the applicable law." *Vogh*, 41 P.3d at 428.

Finally, in its opinion the Missouri Court of Appeals, Eastern District stated that in Missouri swearing a jury is not a mere formality because jeopardy attaches when a jury is impaneled and sworn, and double jeopardy protection may be applicable thereafter. *State v. Davis*, No. 86313, *slip op.* at 6-7 (Mo. App. E.D. June 6, 2006). At first glance, the court's argument seems ominous: if the jury is not sworn, then jeopardy has not attached, and a defendant might fall victim to being put twice in jeopardy for the same offense; in such a circumstance, how would a defendant protect himself from an overzealous prosecutor?

What seems to be a quandary, upon further examination, is not problematic. Although it is an oft-repeated maxim that the double jeopardy clause attaches in a jury trial when the jury is empaneled and sworn, it does not take much searching to find that this is not a bright-line rule. For example, in cases where the jury fails to agree on a verdict, where the trial court has declared a mistrial (not due to the state's misconduct), or where the trial court terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence, although the jury has been sworn, jeopardy has not attached because there has been no finding as to the defendant's guilt or innocence. *See State v. Smith*, 988 S.W.2d 71, 78 (Mo. App. W.D. 1999)(discussing when jeopardy attaches and when double jeopardy provision is applicable); *Serfass v. United States*, 420 U.S. 377, 391-392, 95 S.Ct. 1055 (1975)(finding that jeopardy does not attach unless a question of the defendant's guilt or innocence is involved).

Conversely, where there *has* been a finding as to the defendant's guilt, as in this case, jeopardy would necessarily attach even though the jury was not formally sworn. Double jeopardy analysis does not end simply because the jury was not sworn as the Court of Appeals suggests. Because appellant was convicted in this case, he would be protected by the double jeopardy clause from being re-tried for the same offenses. This is because the double jeopardy clause protects, in applicable part, "against a second prosecution for the same offense *after conviction*. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969)(emphasis added).

This analysis would also hold true if the defendant had been acquitted by a jury that had not been sworn. To hold otherwise, and to find that jeopardy did not attach because the jury was not sworn, would necessarily mean re-trying a defendant even after an acquittal by an unsworn jury. Also, in *Vogh*, *Sides*, and *Arellano*, it is interesting to note that the courts were seemingly unconcerned about the possibility that the defendants in those cases would lack the protection of the double jeopardy clause because their respective juries were not sworn. Perhaps this is because these courts recognized that because the defendants had been convicted, jeopardy had attached.

In sum, the purpose of the oath is to awaken the conscience of the jury and impress upon the jurors the serious duty imposed upon them. *Arellano*, 965 P.2d at 295. Clearly, the voir dire process and jury instructions awakened the conscience of appellant's jury and impressed upon the jurors the serious duty imposed upon them. So, although the empaneled jury was not administered a formal oath, appellant received a fair trial by an impartial jury. Further, appellant waived the defect in the administration of the oath because he failed to raise an objection until after the verdict had been returned and the jury dismissed. Finally, even though the jury was not sworn, appellant would be protected by the double jeopardy clause from being re-tried for the same offenses because he was convicted. Appellant's claim should be denied.

II.

The trial court did not abuse its discretion when it permitted the State to introduce evidence that appellant and his co-defendant were identified as robbing a bar four days before they robbed the IGA grocery store, because the robberies were sufficiently similar, tending to establish appellant's identity as one of the IGA robbers, in that appellant and Paul Bainter used the alias "Ed" in the bar robbery and then four days and file miles away two men robbed an IGA, where the robbers again used the alias "Ed," where the IGA robbers shared many similarities as appellant and Bainter, and where the circumstances of the robberies was similar.

Appellant challenges the admission of evidence concerning the robbery of McDonald's Bar in Hazelwood on December 30, 2003, on the grounds that it was inadmissible evidence of other crimes that was not logically or legally relevant to prove his identity as one of the men who robbed the IGA on January 3, 2004, which was the crime for which appellant was being tried (App. Br. 35). However, the evidence was admissible to establish appellant's identity as one of the IGA robbers.

A. Standard of Review

Review of a trial court's decision to admit evidence is limited to a determination of whether the admission was an abuse of discretion. *State v. Mattic*, 84 S.W.3d 161, 169 (Mo. App. W.D. 2002). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as

to shock the sense of justice and indicate a lack of careful consideration. *State v. Stephens*, 88 S.W.3d 876, 881 (Mo. App. W.D. 2002).

B. Relevant Facts

The State filed a pre-trial motion asking the trial court to allow evidence of the December 29, 2003, McDonald's Bar robbery in order to prove the identity of the IGA robbers (L.F. 30-32). Appellant objected to the motion at a pre-trial hearing held on August 19, 2004 (Hr. Tr. 8-19-04 at 62-79). On September 30, 2004, the trial court granted the State's motion to allow evidence of the McDonald's Bar robbery (L.F. 53). The trial court's order read as follows:

> The State shall be permitted to adduce evidence of the MacDonald's [sic] bar robbery in the form of testimony and physical evidence seized, including the CITGO gas video tape and the witness identification from the tape for the following reasons: Identity in the above styled case is at issue; the victims of the alleged robbery at the Frontier IGA do not know the Defendants. The Defendants were positively identified by the witness of the CITGO video tape, a witness who knows the Defendants; the physical evidence seized and the similar clothing, physical descriptions and modus operandi, including the use of guns, ski masks, the word "Ed", the use of black, "cracked" or ribbed gloves are sufficiently specific and similar to overcome a presumption of mere coincidence, and taking into consideration the proximity of dates of alleged offenses and the fact that they took place in neighboring counties make

> evidence concerning the MacDonald's [sic] bar logically and legally relevant to prove the identity of the alleged IGA robbers, not to show a mere propensity to commit robberies. The probative value of the evidence overcomes the prejudicial effect and is necessary to show the positive identification of the Defendants and why they were located (with items connected to IGA). The Court will not permit testimony about the shooting and death in the MacDonald's [sic] bar incident, unless the State can show, by additional argument, why testimony about the shooting should be permitted.[7]

(L.F. 70).

At trial, the State presented the following evidence regarding a robbery that occurred at the McDonald's Bar in Hazelwood on December 30, 2003 (Tr. 645-646). The McDonald's Bar was located five miles from the IGA, right over the 370 bridge (Tr. 647). Around 1:10 a.m. on December 30, 2003, Diane Barry was getting ready to close McDonald's Bar when two men came in the door wearing dark colored ski masks and dark gloves and carrying guns (Tr. 745-748, 770, 809, 811).[8] Ms. Barry did not see any headlights from a car pulling up to the bar before the men entered, which was unusual (Tr. 746). One

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[7]No such evidence was admitted at trial.

[8]Ms. Barry thought that the gloves worn by the robbers were similar to State's Exhibits 9A and 9B, the gloves found in the yard of 750 Danny Lane where Bainter was apprehended (Tr. 770-771, 906).

man was taller than the other, but both were stocky (Tr. 747). The taller man was white and was wearing layers of "ratty looking" t-shirts, including red and black, and a jacket that wasn't zipped because it was too small for him (Tr. 747-749, 802). He also wore dark camouflage pants (Tr. 647, 748, 770, 809). The smaller man wore a light colored jacket with a hood (Tr. 748, 810).

The bigger robber said, "this is a robbery, this is no joke" (Tr. 749). He told the three customers in the bar to get on the floor with their hands above their heads (Tr. 749, 810). The bigger robber told the smaller robber, "Ed, if anyone moves kill this mother f-----," referring to customer Sean Marlowe (Tr. 749, 810-811). Ms. Barry remained standing but put her hands up, and asked the men what she should do (Tr. 749-750). Ms. Barry noticed that the bigger robber, the only one who spoke, had a distinctive "country" accent (Tr. 749, 775, 813).

The taller man told Ms. Barry to get him the money (Tr. 750). He asked Ms. Barry where the safe was located and if she knew the combination (Tr. 750, 811). Ms. Barry told the gunman that she did not know the combination to the safe, and said that the owner did (Tr. 750, 811). The man asked Ms. Barry if it would be unusual for her to call the owner at that time of night and ask him the combination; Ms. Barry said it would be unusual because she had never done so in the twenty years she had worked at the bar (Tr. 750-751, 811). The man said that he believed her (Tr. 751). The man then said that he wanted all the money, even change, and the money from her own purse and the tip jar (Tr. 751). He pointed his gun

at each thing he named (Tr. 751). Ms. Barry collected all of the money and put it in a bag that contained several rolls of quarters that the bar kept for the pool tables (Tr. 751-752).

After she had collected all of the money, the man asked if there was any more, and Ms. Barry told him that there was more in the office (Tr. 752, 812). He walked her to the office at gunpoint (Tr. 752). The gun had a long barrel and a "pointy thing at the end of it" (Tr. 752, 770).[9]

Ms. Barry got all the money she could find and put it in the bag; this included their $750 "bank" for the next day, bundles of fifty $1 bills and fifty $5 bills secured with a rubber band, and their Saturday night "bank drop" that was in a sealed envelope (Tr. 754).[10] Included in the money was a paid bar tab of $38.50 made up of a $20 bill, a $10 bill, a $5 bill, and three $1 bills, which was stapled to a slip of paper with the name Brian McNamara on it (Tr. 767). When someone paid their tab, the bar always stapled their tab – a piece of paper with their name on it and the amount they owed – to the money and then wrote the date

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[9]Ms. Barry thought that State's Exhibit 1, the gun found when Bainter was apprehended, looked like the same gun that had been pointed at her during the robbery of the bar (Tr. 769-770). People present during the IGA robbery also believed that State's Exhibit 1 was similar to the gun the larger robber used (Tr. 343, 392, 405, 462, 484, 545, 548, 550-551, 889, 892-893).

[10]The Saturday night "bank drop" was dropped on the office floor before the robbers left the bar (Tr. 768).

the tab was paid on the paper (Tr. 766-767). Ms. Barry was told to turn around and face the wall and put her hands up (Tr. 755). When she turned around, the man was gone (Tr. 755). She called 911 (Tr. 755).

While Ms. Barry and one of the robbers were in the office, customer Sean Marlowe was able to escape by running to the back of the bar and kicking out a window (Tr. 812). As he was running down the alley behind the bar, he saw the two robbers at the rear of the bar running away down a hill (Tr. 813).

After the robbery at the McDonald's bar, the police checked other businesses in the area for surveillance videos that might give them leads as to the robbers' identities (Tr. 648). A tape from a Citgo gas station about a quarter mile from the bar led to the identification of appellant and Bainter by a Citgo clerk as having been in that gas station approximately four hours before the bar robbery (Tr. 648-649, 651, 724-727, 746-747). Bainter, as depicted on the videotape, was wearing a pair of faded camouflage pants, a dark sweat shirt, a dark colored stocking cap, and dark colored gloves (Tr. 651, 654). The clerk, Samantha Dussold, spoke with Bainter when he came in the store and remembered that he had a slight southern accent (Tr. 726). The videotape showed that appellant was wearing a pair of dark pants and a white hooded coat (Tr. 651, 654). The clerk then picked their photos from lineups prepared after the IGA robbery, when the police decided there were similarities between the two robberies (Tr. 618-620, 655, 667-668, 672-673, 722-723).

Ms. Barry was also shown the surveillance tape from Citgo and the still photographs made from it (Tr. 652-653). She believed that there were two men in the video that were

similar in size and shape as the two robbers (Tr. 773-775). Also, Ms. Barry believed that the two men in the video wore similar dark clothing to the robbers; the man that looked similar to the first robber was wearing a hat that was the same color as the first robber's ski mask and a jacket that would not close all the way (Tr. 773-775). When she was shown State's Exhibits 53B and 53C, still photos of the two men from the video whom she thought looked similar to the robbers, Ms. Barry identified appellant as the smaller robber, who she knew because he came into the bar (Tr. 775-777).[11] Appellant lived a few streets behind the bar (Tr. 777). Ms. Barry identified the man in State's Exhibit 53D as the bigger robber (Tr. 774-775).

C. Analysis

As a general rule, evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit similar crimes. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). However, evidence of a defendant's prior misconduct "is admissible if the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect." *Id*. at 13. *See also State v. Reese*, 274 S.W.2d 304, 307 ("The acid test is [the other crime's]

[11]Samantha Dussold, the clerk at Citgo, also identified the man in Exhibits 53B and 53C as appellant, and the man in Exhibit 53D as the bigger man (whom she later identified in a lineup as Bainter) (Tr. 618-620, 655, 667-668, 672-673, 721-723, 726).

logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced"). In the context of determining the legal relevance of uncharged crimes evidence, prejudice is a function of whether the admission of this evidence would cause a jury to convict as to the charged crimes simply because the defendant had engaged in prior bad acts or crimes, regardless of the logically relevant evidence in the case. *State v. Williams*, 976 S.W.2d 1, 4 (Mo. App. W.D. 1998); *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). The balancing of the probative value of the evidence against its prejudicial effect lies within the sound discretion of the trial court. *Bernard*, 849 S.W.2d at 13.

Generally, evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged when it tends to establish motive, intent, absence of mistake or accident, common scheme or plan, identity of the person charged with the commission of the crime on trial, or signature *modus operandi* / corroboration. *Bernard*, 840 S.W.2d at 13, 17; *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). Evidence of prior misconduct that does not fall within one of the enumerated exceptions may nevertheless be admissible if the evidence is logically and legally relevant. *Bernard*, 840 S.W.2d at 13; *Sladek*, 835 S.W.2d at 311-312.

If the identity of the wrongdoer is at issue, the identity exception permits the state to show the defendant as the culprit who has committed the crime charged by showing that the defendant committed other uncharged acts that are sufficiently similar to the crime charged in time, place, and method. *Bernard*, 849 S.W.2d at 17; *State v. McDaniels*, 668 S.W.2d 230, 232-233 (Mo. App. E.D. 1984); *State v. Young*, 661 S.W.2d 637, 639 (Mo. App. E.D. 1983).

"More is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts." *Young*, 661 S.W.2d at 639. The necessity to show that the uncharged and charged crimes are sufficiently similar to one another is only to link one crime to the other, tending to prove that the known perpetrator of the uncharged crime was the unknown perpetrator of the charged crime. *State v. Anthony*, 881 S.W.2d 658, 660 (Mo. App. W.D. 1994).

In this case, identity was the primary issue as was evidenced throughout both appellant's and Bainter's cross-examination of State witnesses, presentation of testimony, and closing argument (Tr. 1164-1179). Appellant, however, suggests that identity was not an issue in this case because there was other identity evidence admitted at trial that tended to show that appellant and Bainter were the men who robbed the IGA (App. Br. 43-44). Appellant's arguments to the contrary, the identity of the IGA robbers was unknown, as they wore ski masks during the robbery (Tr. 337, 342-344, 379, 397, 400, 404, 420, 423, 464, 479, 483-484). And, in closing argument appellant's defense counsel argued that appellant was not the second IGA robber because the witnesses from the IGA robbery did not correctly describe appellant's eye color or height (Tr. 1152-1156). Counsel stated, "They did not see Mr. Davis" (Tr. 1156). The only evidence Bainter presented at trial was that he weighed 300 pounds a week after his arrest (Tr. 1035). This evidence was introduced to raise an inference that he was not the larger IGA robber, who was believed by witnesses to the robbery to weigh 250 pounds (Tr. 343-344, 461-462, 479, 488-489). In closing argument, the first argument that Bainter's defense counsel made was, "Paul Bainter didn't commit this robbery.

They have the wrong man" (Tr. 1164). Defense counsel also argued that none of the witnesses from the IGA robbery could see the robbers' faces because they were wearing ski masks (Tr. 1164).

Because identity was an issue in this case, the trial court did not abuse its discretion in allowing the State to present testimony and argument regarding the McDonald's Bar robbery because such evidence was logically and legally relevant to prove the identity of the IGA robbers. The evidence appellant argues was erroneously admitted tended to show that appellant and Davis were the men who committed the crime charged (the IGA robbery) by showing that appellant and Davis committed an uncharged act (the McDonald's Bar robbery) that was sufficiently similar to the crime charged in time, place, and method.

First, appellant and Paul Bainter were identified as the men who robbed the McDonald's Bar: both men were identified by a Citgo clerk, first in still photos taken from a surveillance video – Bainter was the man in Exhibit 53D and appellant was the man in Exhibits 53B and 53C – and then in a lineup, as being in the Citgo store four hours before the robbery at the McDonald's Bar (Tr. 618-620, 649, 651, 655, 667-668, 672-673, 722-727, 746-747). The bar was located about a quarter mile from the Citgo gas station (Tr. 648). The bartender at the time of the robbery, Ms. Barry, believed that the photos of Bainter (Exhibit 53D) and appellant (Exhibit 53B and 53C) looked like the two robbers (Tr. 773-777). Ms. Barry named appellant when she saw the still photo of him (Tr. 775-777). In the surveillance video and the still photos taken from the video, appellant and Bainter are wearing clothing similar to that of the McDonald's robbers (Tr. 647, 651, 654, 745-749, 770, 773-775, 802,

809-811). Also, both the Citgo clerk and Ms. Barry noticed that Bainter, the bigger robber, had a distinctive southern, or country, accent (Tr. 726, 749, 775, 813). Thus, appellant and Bainter were identified as the perpetrators of the McDonald's Bar robbery.

Second, the McDonald's Bar robbery was sufficiently similar in time, place, and method to the IGA robbery and tended to show that appellant and Bainter were the men who committed both the IGA robbery and the McDonald's Bar robbery. Bainter, the bigger of the two bar robbers, used the name "Ed" to refer to appellant, the second robber (Tr. 749, 810-811). Ed was not either of the robbers' real names; appellant's name is Robert William Davis and Bainter's full name is Paul Leslie Bainter. One of the men who robbed the IGA also used the name "Ed" to refer to his accomplice (Tr. 395, 420, 471-472). This name was clearly an alias, as the smaller robber initially referred to the bigger robber as "Paul," (Bainter's real name) but then corrected himself and repeated the name "Ed" several times (Tr. 395, 420, 471-472).

The fact that Bainter, one of the known McDonald's Bar robbers, referred to appellant, the other known robber, as "Ed," which was an alias, tends to prove that the IGA robbers were also appellant and Bainter because the IGA robbers also used the name "Ed" as an alias during the robbery. Further, before the name "Ed" was used as an alias to protect the robbers' identity, the smaller IGA robber called the larger IGA robber "Paul" (which happens to be Bainter's first name), and then quickly corrected himself, and repeated the name "Ed" several times (Tr. 395, 420, 471-472).

There were other similarities between the two robberies that tended to show that appellant and Bainter committed both robberies. The guns used in the McDonald's Bar and IGA robberies were similar (Tr. 343, 392, 405, 462, 484, 545, 548, 550-551, 769-770, 889, 892-893). Both appellant and Bainter and the IGA robbers wore dark ski masks and black gloves during the robberies (Tr. 337, 342-344, 379, 397, 400, 404, 420, 423, 464, 479, 483-484, 745-748, 770, 809, 811). Paul Bainter, who weighed 300 pounds, was bigger than appellant, although both men were stocky (Tr. 747, 1035). Similarly, the first IGA robber, who was called "Paul" by the second robber, was bigger, both in height and weight, than the second robber (Tr. 343-344, 395-396, 404, 419-420, 461-462, 472, 479). Both of the IGA robbers were heavy set; witnesses believed that the first man weighed around 250 pounds and was a little over six feet tall, while the second man was about 5'7" to 5'9" and relatively large for his height, between 170 and 230 pounds (Tr. 343-344, 461-462, 479, 488-489).

Both of the robberies occurred shortly before closing time of the respective establishments (Tr. 337, 342-343, 747-748, 770, 809, 811). The robberies occurred close in time – the McDonald's bar robbery happened on December 30, 2003, four days before the IGA robbery on January 3, 2004 (Tr. 337, 342-343, 645-646). Also, the businesses robbed were close in proximity; the IGA was located in St. Charles County at 2871 Highway 94 North about a half mile north of the 370 bridge and about five miles from McDonald's Bar, which was located right over the 370 bridge, at 12523 Missouri Bottom Road (Tr. 337, 647).

Appellant and Bainter took both cash and coins, including numerous rolls of quarters from McDonald's Bar (Tr. 751-752, 754). At the bar, some of the cash the robbers took had

been stapled together before being put in the register to show that a tab had been paid (Tr. 766-767). The IGA robbers also took cash and rolls of coins that were wrapped in white paper with orange writing (Tr. 347, 363, 365). When appellant and Bainter were eventually apprehended, numerous rolls of quarters and other coins were found in their possession; some of the coins were wrapped in white paper with orange writing similar to the coins stolen from the IGA, and some of the coins were wrapped in brown paper (Tr. 898-900). Co-mingled in Bainter's fanny pack with the rolls of quarters stolen from IGA, was a piece of paper with handwritten directions to the general location of the McDonald's Bar (Tr. 898-900, 903). Officers also found many bills that had staple-like holes in them; it is a reasonable inference that this money was taken from McDonald's Bar and once had paper bar tabs stapled to the bills (Tr. 943-944, 977-978).

Because the two robberies were sufficiently similar to one another in time, place, and method, they tended to prove that appellant and Bainter, the known perpetrators of the McDonald's Bar robbery, were also the men who robbed the IGA. Again, the robbers of both McDonald's Bar and IGA used the alias "Ed," the bar robbers were positively identified as appellant and Paul Bainter, and thus this logically leads to the conclusion that the "Eds" who robbed the IGA were also the "Eds" who robbed McDonald's Bar – appellant and Paul Bainter. Additionally the IGA robbers shared many physical similarities as appellant and Bainter, such as weight, body build, and relative size. The circumstances of the robberies were also similar, including similar weapons, similar time of occurrence, similar clothing and/or ski masks, and similar property taken. Also, when appellant and Bainter were caught,

they had items linking them to both robberies. Evidence of the bar robbery had a legitimate tendency to directly establish appellant's identity as one of the IGA robbers. As such, the evidence of uncharged crimes was relevant.

In addition, the court limited the amount of evidence the State was allowed to introduce concerning the McDonald's bar robbery (L.F. 70). For example, the court did not allow the State to introduce evidence that one of the patrons of McDonald's bar was shot and killed during the robbery, but instead limited the evidence to that which established appellant's and Bainter's identities as the bar robbers and the evidence which tended to show that appellant and Bainter were the two IGA robbers (L.F. 70). The trial court, thus, did not abuse its discretion in admitting evidence that appellant and Paul Bainter were involved in the robbery of McDonald's Bar because identity was at issue in the present case – the robbery of the IGA – and evidence concerning the bar robbery was logically and legally relevant to prove that appellant and Bainter were also involved in the IGA robbery.

Evidence of uncharged crimes tending to show the defendant's identity for the charged crime was found to be properly admitted in *State v. Young*, 661 S.W.2d 637 (Mo. App. E.D. 1983), *State v. McDaniels*, 668 S.W.2d 230 (Mo. App. E.D. 1984), and *State v. Thurman*, 887 S.W.2d 403 (Mo. App. W.D. 1994). In *Young*, the defendant was charged with sexually attacking one victim and challenged the admission of evidence from two other women who described similar sexual attacks upon them and identified the defendant as the perpetrator. *Young*, 661 S.W.2d at 638-639. The court held that the evidence of uncharged

crimes was properly admitted because it found the defendant's methodology in the three attacks sufficiently similar, thereby establishing the defendant as the perpetrator of all three crimes. *Id*. at 640. Specifically, the court pointed to the following evidence as tending to prove appellant was the unknown perpetrator of the charged crime: that all three of the victims accepted rides from defendant on the premise that he would take them home; defendant drove all three to secluded parking lots and parked his car so close to another vehicle that the victims were unable to escape from the passenger side; defendant threatened victims in a similar manner; before attacking his victims, defendant first discussed oral sodomy; finally, in all three cases, defendant attempted or succeeded in committing oral sodomy upon his victims. *Id*. at 640.

Likewise, in *McDaniels*, the court found the methodology of attack of the uncharged crime and the charged crime "sufficiently similar to earmark them [both] as the handiwork of the accused." *McDaniels*, 668 S.W.2d at 233. The court related the unique methodology as follows: both the uncharged and charged crime occurred in the same general vicinity; neither woman had any prior acquaintanceship with her attacker; in each attack, defendant grabbed his victim and exhibited his knife to emphasize his threat; each time, defendant completely disrobed his victim before engaging in both anal sodomy and intercourse; and in each case defendant used vasoline when sodomizing his victim. *Id*. The court recognized that there were dissimilarities in the two attacks, but stated "the differences pale in comparison to the striking similarities, and therefore, go to the weight, not the admissibility of the testimony." *Id*.

In *Thurman*, the defendant was charged with first degree assault and armed criminal action after he shot a woman sitting in her car when she refused to give him her purse. *Thurman*, 887 S.W.2d at 405. At trial, the state introduced evidence that the defendant committed a subsequent assault against another victim, to which he confessed. *Id*. at 408. The defendant challenged the admission of his confession to the uncharged assault and to the admission of ballistics evidence showing that the bullet and shell casing recovered from the scene of the charged crime was fired from the same gun as the bullet and shell casing recovered from the scene of the uncharged crime to which the defendant confessed. *Id*. The Missouri Court of Appeals, Western District, found that evidence relevant and admissible because it had a "legitimate tendency to directly establish [the defendant's] identity" as the person who committed the crime for which he was on trial, and as such found that the trial court "did not err, plain or otherwise," in admitting such evidence. *Id*. at 409.

In this case, the two robberies were sufficiently similar in time, place, and method, which tended to prove that both robberies were the handiwork of appellant and Bainter. Evidence that appellant and Bainter were the men who robbed the McDonald's Bar thus tended to prove that appellant and Bainter were also the men who committed the crime for which appellant was on trial (the IGA robbery). Because identity was an issue in this case, and because the two robberies were sufficiently similar, the trial court did not abuse its discretion in allowing the State to present testimony and argument regarding the McDonald's Bar robbery because such evidence was logically and legally relevant to prove the identity of the IGA robbers.

III.

The trial court did not err in overruling appellant's motion for a judgement of acquittal on Counts 3, 5, 7, 9, 11, 13, and 15, the felonious restraint of Brian Moore, Sean Moore, James Vails, Rachel Wilman, Renee Hudson, Terry Pointer, and Kenneth Condor (as well as the corresponding counts of armed criminal action), because the evidence was sufficient to show that appellant unlawfully restrained these seven people and exposed them to a substantial risk of serious physical injury in that the evidence showed that appellant prevented these seven people from leaving the IGA grocery store by brandishing a gun and then forced them to enter the store's meat cooler, again by brandishing a gun, told them to stay inside the cooler, where the temperature was kept in the low thirties, and shut the door to the cooler.

Appellant argues that the evidence was not sufficient to support the seven counts of felonious restraint, and the corresponding armed criminal action counts, because putting the seven robbery victims inside a meat cooler from which they easily let themselves out did not create a substantial risk of serious physical injury (App. Br. 49).

A. Standard of Review

In reviewing a claim that evidence was insufficient, this Court determines whether there is sufficient evidence from which a reasonable finder of fact could make a finding beyond a reasonable doubt. *State v. Warren*, 141 S.W.3d 478, 489 (Mo. App. E.D. 2004); *State v. Langdon*, 110 S.W.3d 807, 811 (Mo. banc 2003). In applying this standard, this Court views the evidence in the light most favorable to the State and grants the State all

reasonable inferences from the evidence, disregarding all contrary evidence and inferences. *State v. Warren*, 141 S.W.3d at 489-490. This Court does not weigh the evidence. *Id*. at 490. In this situation, the jury determined the credibility of the witnesses, and was entitled to believe all, some, or none of the testimony of the witnesses. *Id.*

B. Analysis

Appellant was charged with seven counts of felonious restraint, one count for each person present at the IGA on January 3, 2004 (L.F. 72-82). A person commits the crime of felonious restraint "if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury." §565.120. The information charged appellant with felonious restraint as follows:

> [O]n or about January 3, 2004, in the County of St. Charles, State of Missouri, . . . the defendant, acting in concert with another, knowingly restrained [name of victim], unlawfully and without consent so as to interfere substantially with his liberty and exposed [victim's name] to a substantial risk of serious physical injury.

(L.F. 73).

There is no requirement that the restraint involved occur over a long period of time; rather, the issue is whether the restraint was itself substantial. *State v. Abel*, 939 S.W.2d 539, 541 (Mo. App. E.D. 1997). Serious physical injury is defined in §565.002, as "physical

injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."

In determining whether the defendant exposed the victim to a substantial risk of serious physical injury, this Court has found that:

> Whether the victim suffered serious physical injury is irrelevant. Also, the use of a dangerous weapon is not required to prove felonious restraint. . . . Whether unlawful restraint exposes a victim to the risk of serious physical injury is to be determined from all of the circumstances. . . . Missouri courts . . . [focus] on the defendant's behavior for evidence of physical intimidation or violence which, if repeated or carried further, could have seriously injured the victim or threats of or the propensity to commit violence which, if carried out, could have seriously injured the victim.

State v. Smith, 902 S.W.2d 313, 315 (Mo. App. E.D. 1995); *State v. Cobbins*, 21 S.W.3d 876, 878 (Mo. App. E.D. 2000). "Threat of injury from a weapon is sufficient to substantiate the charge" of felonious restraint. *State v. Brigman*, 784 S.W.2d 217, 221 (Mo. App. W.D. 1989).

In this case, the evidence was sufficient to sustain appellant's conviction for seven counts of felonious restraint. Appellant, acting with another, interfered substantially with the freedom of the seven people in the IGA grocery store on January 3, 2004, by entering the store with a gun and pointing it at people, preventing the seven people from leaving the IGA and making them sit or lie on the ground, and finally forcing them to enter a meat cooler,

where the temperature was kept in the low thirties, telling them to stay there, and shutting the door to the cooler (Tr. 337, 342-345, 379, 391-392, 397, 403-404, 406, 420, 461, 464, 479, 483). This restraint was substantial. *Abel*, 939 S.W.2d at 541.

Additionally, in restraining Brian Moore, Sean Moore, James Vails, Rachel Wilman, Renee Hudson, Terry Pointer, and Kenneth Condor, appellant, acting with another, exposed the victims to a substantial risk of serious physical injury when he brandished a gun at the people in the store and ordered them to follow his directions: Bainter poked his gun in the back of Brian's neck to get Brian to show him the safe; Bainter and appellant ordered one customer to the front of the store, and ordered another customer who was about to leave the store to stay inside the store; appellant "watched" the employees and customers at the front of the store while holding a gun and made one employee take the cash drawer out of a register; Bainter ordered Brian at gun point to give him the store's money, and finally, appellant and Bainter ordered the seven people to walk to the back of the store and into a 10' x 15' meat cooler (Tr. 344-346, 348-349, 366-367, 391-392, 394-395, 403-404, 406-407, 421, 461, 464, 471, 473, 484-485, 487). The fact that appellant and Bainter used a gun to threaten and control the robbery victims was sufficient evidence to substantiate the charges of felonious restraint. *Brigman*, 784 S.W.2d at 221.

Appellant asserts that the robbery victims were only restrained when they were physically in the meat cooler and that there was no evidence that the robbers pointed guns at the victims when they ordered them to go inside the cooler (App. Br. 51-52, 55). Appellant also argues that placing the robbery victims in a meat cooler from which they

easily let themselves out did not create a risk of serious physical injury and was not a substantial interference with their liberty (App. Br. 52-54, 56).

Appellant's arguments to the contrary, there was sufficient evidence to support appellant's convictions for felonious restraint. In this case, appellant substantially interfered with the victims' liberty by using guns to "tell" the victims where they could and could not go inside the store and then using guns to direct the victims into a meat cooler. Although appellant argues that none of the victims testified that the robbers used guns to threaten them when ordering them into the meat cooler, it is reasonable to infer that the robbers still had their guns when they ordered the victims into the meat cooler; there is certainly no evidence that the robbers discarded their weapons or that the victims believed the robbers no longer had guns. Additionally, the fact that the victims were able to exit the meat cooler because the door happened to unlock from the inside, and because the store owner was brave enough to leave the cooler, does not mean that there was insufficient evidence to support appellant's convictions for felonious restraint. Appellant and Bainter substantially interfered with the victims' liberty during the robbery and exposed the victims to a substantial risk of serious physical injury in restraining them, through the threat of guns, in the store and in the meat cooler. The fact that appellant used a gun to threaten and control the robbery victims was sufficient evidence to substantiate the charges of felonious restraint. *Brigman*, 784 S.W.2d at 221. Additionally, finding that there was sufficient evidence to support appellant's convictions for felonious restraint would not make every armed robbery a felonious restraint as well. The crime of felonious restraint requires a "substantial interference" with liberty,

which would not be the case in all armed robberies. §565.120. In this case, however, there was substantial interference with the victims' liberty.

The evidence established that appellant, acting with another, exposed the seven people in the IGA grocery store during the robbery to the risk of serious physical injury and interfered substantially with their liberty; therefore, there was sufficient evidence from which the jury could find appellant guilty of felonious restraint. Because the evidence was sufficient to establish appellant's guilt of the crime of felonious restraint of the seven robbery victims, the trial court did not err in overruling appellant's motion for a judgment of acquittal on the seven counts of felonious restraint and the corresponding armed criminal action counts. Appellant's third point on appeal must fail.[12]

[12]Should this Court find that there was insufficient evidence to prove felonious restraint, discharge would not be the proper remedy; in similar circumstances this Court has remanded for entry of judgment of conviction and sentencing for false imprisonment, a lesser included offense of felonious restraint. *Cobbins*, 21 S.W.3d at 879-880.

IV.

The trial court did not plainly err in denying appellant's motion for severance because both defendants were charged with the offense and appellant failed to make a substantial showing of prejudice.

Appellant does not dispute that the cases were properly joined. Appellant filed a pre-trial motion to sever defendants (L.F. 24-25). That motion argued that because the jury would hear "more evidence" against appellant's co-defendant, Paul Bainter, than against appellant, it might be more willing to convict appellant because it might not want to acquit appellant while convicting his co-defendant (L.F. 25). Additionally, the motion alleged that there were statements made by Paul Bainter upon his arrest which incriminated both defendants but which were admissible only against the co-defendant (L.F. 25). These particular claims are not being reasserted on appeal. Appellant was jointly tried with Bainter and raised this issue in his motion for new trial (L.F. 144).

Now for the first time on appeal, appellant argues that a separate trial was necessary for a fair determination of whether he was guilty (App. Br. 60). Appellant argues that the prejudice from the joint trial manifested itself *during the trial* when Bainter's defense counsel allegedly opened the door to two State witnesses making an in-court identification of appellant based on their prior out-of-court identification of appellant from his eyes and his voice (App. Br. 60). Appellant argues that he was further prejudiced by the joint trial because Bainter's defense counsel stated in closing argument that Bainter resisted arrest, and the jury likely took this statement as an admission by both parties (App. Br. 60). Appellant

argues that had he been tried separately from Bainter, "this would not have happened" (App. Br. 64).

Because the theory on appeal is different from the theory presented at trial, appellant has not preserved this issue for appeal. To preserve an objection for review, the objection must be specific, and the point raised on appeal must be based upon the same theory. *State v. Brethold*, 149 S.W.3d 906, 909 (Mo. App. E.D. 2004). Because it is unpreserved, this claim is reviewable on appeal, if at all, for plain error. *State v. Rousan*, 961 S.W.2d 831, 842 (Mo. banc 1998) *cert. denied* 524 U.S. 961 (1998). "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." *State v. Roberts*, 948 S.W.2d 577, 592 (Mo. banc 1997) *cert. denied*, 118 S.Ct. 711 (1998). Plain errors affecting substantial rights may be considered in the discretion of the court if it appears on the face of the record that the alleged error so substantially affected defendant's rights that a miscarriage of justice or manifest injustice would occur if the error were not corrected. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001). Whether manifest injustice occurred depends on the facts and circumstances of the particular case, and the defendant bears the burden of establishing manifest injustice amounting to plain error. *Id*. This burden requires the appellant to show that the alleged error was outcome determinative. *State v. Cummings*, 134 S.W.3d at 104 (citing *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002)).

Courts traditionally favor joint trials. *State v. Isa*, 850 S.W.2d 876, 885 (Mo. banc 1993). Joint trials "play a vital role in the criminal justice system," and "serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability – advantages which sometimes operate to the defendant's benefit." *Id*., quoting *Richardson v. Marsh*, 481 U.S. 200, 209-210 (1987). Rule 24.06(b) requires that defendants charged in the same indictment or information be tried together unless a defendant files a motion for severance and the court finds the probability of prejudice exists or:

> 1) The defendant is subject to assessment of punishment by the jury and the defendant shows a probability of prejudice would result from this fact if he is not tried separately; or
>
> 2) There is, or may reasonably be expected to be, material and substantial evidence not admissible against the defendant that would be admissible against other defendants if a separate trial is not ordered; or
>
> 3) There is an out-of-court statement that is not admissible against the defendant that would be admissible against other defendants if a separate trial is not ordered unless the court finds the out-of-court statement can be limited by eliminating any reference to the defendant; or
>
> 4) A separate trial is necessary to a fair determination of whether the defendant is guilty.

Id.; *State v. Isa*, 850 S.W.2d 876, 884-885 (Mo. banc 1993). *See also* §545.880.2. Under §545.880, defendants can be tried together even if charged in separate indictments or informations, as was done here (L.F. 72-82).

A motion to sever is appropriate only where there exists a serious risk of compromise of the defendant's rights or the jury's ability to make a reliable judgment about guilt or innocence. *Isa*, 850 S.W.2d at 885. "Severance is required when the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to the separate defendants." *State v. Oliver*, 791 S.W.2d 782, 786 (Mo. App. E.D. 1990). If the trier of fact is able to compartmentalize the evidence against the defendants, then there is no prejudicial error. *Id*.

When, as here, defendants are properly joined, an appellate court will reverse the denial of a severance motion only on 1) a showing of an abuse of discretion; and 2) a clear showing of prejudice. *State v. Kidd*, 990 S.W.2d 175, 182 (Mo. App. W.D. 1999). It is insufficient for an accused complaining about the denial of a severance to show merely that he would have had a better chance for acquittal at a separate trial. *State v. Perkins*, 826 S.W.2d 385, 389 (Mo. App. E.D. 1992); *State v. Johnson*, 753 S.W.2d 576, 586 (Mo. App. S.D. 1988).

Here, appellant does not even allege that he had a defense antagonistic to Bainter's defense. Nor does appellant establish that the jury could not be expected to compartmentalize the evidence as it related to each defendant. Additionally, appellant does not allege any of the factors listed in Rule 24.06(b). Appellant does not allege that he was

subject to assessment of punishment by the jury or that there was material evidence or an out-of-court statement that would not have been admissible against him that would be admissible against Bainter if a separate trial was not ordered.[13]

For the first time on appeal, appellant, without citing to any authority, points to actions taken by Bainter's counsel *during trial* (allegedly opening the door to an in-court identification of appellant and counsel's statements in closing argument) to argue that the trial court should have granted his motion to sever *prior to trial*. These alleged missteps by Bainter's counsel could not be foreseen. While it is true that had Bainter been tried separately from appellant, Bainter's counsel could not have opened the door to any identifications or made any closing argument in *appellant's* case, this does not show that the trial court abused its discretion in denying appellant's motion to sever *prior to trial*. The particular actions of Bainter's counsel appellant complains about on appeal were not inevitable, and the trial court is not expected to be omniscient.

[13]In his brief, appellant does state that a separate trial was necessary to a fair determination of whether appellant was guilty (one of the factors listed in Rule 24.06(b)), but does not provide any analysis to support this bald assertion (App. Br. 62).

V.

The trial court did not plainly err in finding appellant to be a prior and persistent offender and in sentencing him as such, because the State proved beyond a reasonable doubt that appellant had pleaded guilty to two felonies committed at different times in that one of the prior felonies was committed at approximately 11:00 p.m. and the other felony was committed at approximately 11:45 p.m. against a different victim.

Appellant claims that the trial court plainly erred in finding him to be a prior and persistent offender because his two prior felony offenses were not committed on different days (App. Br. 65).

A. Relevant Facts

Appellant was charged as a prior and persistent offender (L.F. 79). Prior to the trial, a hearing was held to determine if appellant was a prior and persistent offender (Tr. 23-25). The State presented a certified copy of appellant's guilty plea (Tr. 23, 25; State's Exhibit 118). Appellant had pled guilty on March 13, 1989 to the class C felony of assault in the second degree for knowingly causing physical injury to Steve Foulks by means of a deadly weapon on January 24, 1988, at approximately 11:00 p.m., at 6190 Behle (Tr. 25; L.F. 79; State's Exhibit 118). Appellant had also pled guilty on March 13, 1989 to a separate count of assault in the second degree for knowingly causing physical injury to Donald Sullivan by means of a deadly weapon on January 24, 1988, at approximately 11:45 p.m., at 6190 Behle (Tr. 25; State's Exhibit 118). Appellant was represented by an attorney at the guilty plea

hearing (Tr. 25). The court found that the State had proven that appellant was a prior and persistent offender beyond a reasonable doubt (Tr. 25).

B. Analysis

Missouri law provides that "[t]he court may sentence a person who has pleaded guilty to or has been found guilty of an offense . . . to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender." Section 558.016.1. A "persistent offender" is one who has pleaded guilty to or has been found guilty of two or more felonies committed at *different times*. Section 558.016.3.

Acknowledging that this issue was not preserved for review because defense counsel failed to object when the trial court sentenced appellant as a persistent offender, appellant complains that the two prior felonies the State used to prove that he was a persistent offender were not committed at "different times" because they were committed on the same day (App. Br. 65). Appellant says that the fact the two prior felonies were committed approximately 45 minutes apart is "inconsequential absent a further showing by the State that the charged offenses were not part of a single episode" (App. Br. 67).

The fact that two crimes were committed on the same day does not mean they were not committed at "different times." Nor does the fact that the crimes were committed 45 minutes apart mean that they were not committed at "different times." *State v. Gilliehan*, 865 S.W.2d 752 (Mo. App. E.D. 1993), citing *State v. Davis*, 611 S.W.2d 384, 386 (Mo. App. S.D. 1981) ("A satyr might criminally sate his desires on the same date at different matings without having committed all of his felonious fornications at the same time"). In *Gilliehan*,

the court found that the crimes underlying the prior convictions were committed at different times because they were committed at different times – 5:30 a.m. and 10:30 a.m. – albeit on the same day. *Gilliehan*, 865 S.W.2d at 755.

The Missouri Supreme Court recently addressed this issue in *State v. Sanchez*, 186 S.W.3d 260 (Mo. banc 2006). In *Sanchez*, the Court stated that "felonies are not committed at different times if they are committed as a part of a continuous course of conduct in a single episode." *Id*. at 3. In that case, the defendant had previously committed two weapon crimes on the same date. *Id.* First, the defendant, carrying a shotgun, entered a restaurant located in a shopping plaza. *Id*. Then he left the restaurant in a truck. *Id*. When the police arrived at the shopping plaza, they saw the truck about 100 yards from the restaurant on the plaza parking lot. *Id*. The police stopped the defendant, removed him from the truck, patted him down, and found a handgun concealed in his belt. *Id*. In holding that the two prior felony convictions were not committed at different times, the Court noted that there was no evidence as to what time interval occurred between the time the defendant entered the restaurant and the time the truck was stopped. *Id*.

Unlike *Sanchez*, in this case there was evidence that appellant's prior felonies were committed at "different times." The evidence showed that appellant's two prior felonies were not part of a continuing course of conduct in that they were committed forty-five minutes apart and were committed against different victims. As such, the trial court did not plainly err in finding appellant to be a prior and persistent offender and in sentencing him accordingly.

CONCLUSION

For the foregoing reasons, respondent asks that this Court affirm appellant's convictions and sentences.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
lisa.kennedy@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 17,523 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of August, 2006, to:

S. Kristina Starke
1000 St. Louis Union Station, Suite 300
St. Louis, Missouri 63103
(314) 340-7662
(314) 340-7685 (Fax)

JEREMIAH W. (JAY) NIXON
Attorney General

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Fax (573) 751-5391
lisa.kennedy@ago.mo.gov
Attorneys for Respondent

RESPONDENT'S APPENDIX